IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1041 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMANBHAI NANJIBHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR ADIL MEHTA WITH KJ SHETHNA for Petitioners

MR BY MANKAD, APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE C.K.BUCH

Date of decision: 04/07/2000

ORAL JUDGEMENT (PER ; C.K.BUCH, J)

1. The appellants- original accused nos. 1 to 4, by filing this appeal, have challenged the impugned judgment and order dated 5.11.1990 passed by the learned Addl. Sessions Judge, Himmatnagar (District : Sabarkantha) in Sessions Case No. 14/90, convicting appellants-accused for the offence punishable under sec.302 R/w sec.34 of the Indian Penal Code (hereinafter referred to as "IPC") and sentencing them to suffer R/I for Life.

2. The appellants were charged by the learned Sessions Judge, Himmatnagar (District : Sabarkantha) for intentionally and knowingly causing serious injuries to one Ramanbhai Bachubhai (deceased) with weapons like knife (khanjar), gupti, dharia and stones, resulting into the death of the injured Ramanbhai. In other words, as per the prosecution case, the appellants accused caused injuries, with common intention, to the deceased knowing that the same would result into death of deceased Ramanbhai and, thereby committed offence punishable under sec.302 R/w sec.34 of IPC. All the accused were charged for the offences punishable under sections 302, 504 R/w Sec.34 of the IPC. After the trial, learned Sessions Judge, vide impugned judgment, convicted the appellants-accused for the offence punishable under ec.302 R/w sec.32 of the IPC and sentenced them to suffer R/I for Life. However, vide the said judgment, learned Sessions Judge acquitted the appellants accused for the offence punishable under sec.504 of IPC.

3. The case of the prosecution, as unfolded by the first document i.e. FIR lodged by complainant P.W.2 Dasharathbhai Maganbhai (exh.14) reveals that all the accused, on 30.10.89 at about 4.30 P.M., at village Vankada, in furtherance of their common intention to commit murder of Ramanbhai Bachubhai, accused no.2 gave gupti blow on the neck of Ramanbhai Bachubhai and accused nos. 1, 3 & 4 pelted stones and thereby caused injuries to said Ramanbhai Bachubhai. It is pertinent to note that during the course of investigation, the prosecution moulded its case to some extent. It is specifically pleaded that one of the accused was holding dharia and another was with knife and they assaulted deceased Ramanbhai Bachubhai. FIR lodged at Vijaynagar Police Station on the next day of the incident i.e. on 31.10.89 reveals that the police had also registered offence punishable under sec. 337 of IPC and after investigation, challan under sec. 173 of Cr.PC was filed accordingly before the learned Judicial Magistrate (First Class) Himmatnagar. Learned Sessions Judge, who framed

the charge against the accused vide exh.2, while initiating trial against the present appellants accused, has not charged any of the accused for the offence punishable under sec. 337 of the IPC.

4. According to the prosecution, incident had occurred suddenly and has its origin in the hot exchange of words which took place when young girls were playing with "Lakhoti" (fables) which ultimately resulted into a quarrel. The prosecution has also pleaded that the relations between deceased Ramanbhai Bachubhai and family of accused no1 Ramanbhai Nanjibhai Parmar were not cordial and accused no.1 Ramanbhai Nanjibhai was having suspicion that deceased Ramanbhai Bachubhai has illicit relations with his mother (mother of accused no.1). The third cause which is brought on record by the prosecution for occurrence of incident is that there were inimical relations between the accused and complainant side during trial and the same will be taken care of while dealing with the evidence of the concerned witness. In nutshell, motive is pleaded by the prosecution. After going through the description of three weapons namely knife, dharia and gupti, it can be inferred that they must be having sharp-edge and can cause grievous hurt on the body of the person concerned. The learned Sessions Judge, while holding appellants accused guilty of the offence punishable under sec.302 R/w sec.34 of IPC, has mainly relied on the oral evidence of three witnesses viz. P.W.2 Dasharathbhai Maganbhai - complainant (exh.14), P.W.4 Ranjanben Bachubhai (exh.17) and P.W.5 Shantilal Laxmanbhai (exh,18). Learned Sessions Judge, after considering evidence of P.W.1 Dr. Dhansukh Varlekar (ex.10), has held that the evidence led by Dr. Varlekar who performed post mortem on the body of deceased Ramanbhai and had also examined accused no.1. Raman Nanji, corroborates the case of the prosecution materially and, therefore, case put forward by the prosecution should be accepted and the same has been accepted. The learned Sessions Judge, on appreciation of evidence of panch witness and panchanama drawn under sec.27 of Evidencee Act and also the report of FSL, has held that prosecution case is sufficiently corroborated.

5. Record and proceedings of the trial conducted by the learned Sesions Judge is before us and learned Senior Counsel Mr. Shethna has taken us through the entire set of evidence, oral as well as documentary, led before the trial Court. Learned Senior Counsel Mr. Shethna appearing for the appellants-accused has assailed the judgment from all the corners and has submitted that the

findings of the learned Sessions Judge are erroneous and palpably wrong on all counts because the evidence of witnesses examined by the prosecution has not been appreciated properly and in its true or proper perspective.

6. While reading relevant portion of depositions of witnesses examined before the trial Court, learned Senior Counsel Mr. Shethna has brought to our notice some material contradictions and improvements . Mr. Shethna has mainly argued that FIR lodged in the Vjaynagar Police Station under sec.154 of CrPC can be termed as a "delayed FIR" and, therefore, the story put forward by the prosecution should be viewed with great doubt. He has rightly argued that mere delay in filing FIR would not go against the prosecution, but in the instant case, delay in lodging FIR may positively affect adversely to the case of the prosecution. In catena of decisions, on given set of facts, this Court as well as Apex Court have held that "delayed FIR" even by some hours would affect adversely to the case of the prosecution and in some events, it may not be treated fatal to the prosecution. In the instant case, Mr. Shethna has tried to point out that this is a case wherein there was ample opportunity to the complainant Dasharathbhai to rush to the nearest police station at Vijaynagar and he could have unfolded the incident at the earliest. It is in evidence that Vijaynagar police station is at a distance of about 9 kms. from the place of incident. Incident has occurred at about 4.30 P.M. It is in evidence that village where the incident has occurred and villages situated nearby, there were motorcycles and other vehicles like tractors and jeep cars available. Even than complainant Dasharathbhai had failed in lodging FIR at the earliest point of time. Mr. Shethna has also pointed out that there is a police out-post at village Pal which is comparatively nearer and is at a distance of about 2 1/2 to 3 Kms. from the village where the incident has occurred. On careful reading of deposition of complainant Dasharathbhai, according to Mr. Shethna, one can easily infer that he is not a rustic, illiterate villager, though resident of remote village in view of his conduct prior to the incident, during the incident and subsequent thereto. Mr. Shethna has submitted that though this witness has tried to see Sarpanch, as per the case of the prosecution, at the earliest, has not cared to go to the police station for lodging FIR. Mr. Shethna has submitted that FIR in the case on hand suffers from various infirmities and unexplained delay is one of the vital infirmities. By way of example, Mr. Shethna has drawn our attention to two to three facts on

the strength of which he has submitted that though the FIR is lodged at a very late stage, prosecution has tried to supress truth and has created altogher a different story. In support of his submission, Mr. Shethna has pointed out that there is no reference of use of knife (Khanjar) by any of the accused during the alleged incident in FIR, but even than, police has recovered blood-stained knife (khanjar) from the alleged scene of offence. The alleged incident, according to the prosecution, has occured in the midst of the hutments of the villagers and deceased Ramanbhai Bachubhai was assaulted in broad day light and that his body was dragged or taken upto the house of the deceased. As per the story narrated by the complainant and prosecution witness Ranjanben, even than nobody had located knife allegedly used in the assault. Initially, it was the case that only one accused had assaulted the deceased with sharp-edged weapon and rest were pelting stones at the deceased. If Dasharathbhai was aware about the entire incident, then normally he would narrate each event in the FIR. So, it is argued that though the FIR is lodged on the next day morning, entire story which was brought before the Court, was not unfolded before the police while lodging the complaint. It is also pointed out that the complainant, one another relative, police patel and sarpanch had gone to the police station at 7.00 A.M. in the morning for lodging FIR, but complaint was written on a blank paper and offence was registered much latter i.e. after 10.30 A.M. This time gap is not explained by any of the witnesses including the complainant. Mr. Shethna has argued that this delay provides every chance of false implication of all the accused and to fabricate a story. He has also argued that, as per evidence, three close relatives of the deceased Ramanbhai Bachubhai were serving in the police Department on the relevant date of incident and one of them was in the Head Quarters at Himmatnagar and another one was First Writer Head Constable in Vijaynagar Police Station itself. By reading relevant portion of evidence, Mr. Shethna has pointed out that when alleged FIR was lodged at Vijaynagar Police Station, that relative of the deceased i.e. First Writer Head Constable was present in the police station itself. So, when the close relatives of the deceased Ramanbhai were police personnels and serving there, then they could have rushed to the police station immediately. It should be legitimately inferred that family of the deceased including complainant Dashrathbhai may be aware of the fact that complaint before the police at the earliest point of time, would be relevant in such an event. Mr. Shethna has argued that in such cases, FIR is the backbone of the prosecution

case. Material improvement or material contradictions with the story narrated in FIR are made or if the story is moulded, then normally the Court should hold that the prosecution case has no legs to stand. Our attention is drawn by pointing out relevant portion of record and proceedings that one of the close relatives serving in the Police Head Quarters at Himmatnagar, had visited the village prior to loding of FIR. Family members of deceased Ramanbhai could have been made complainant if any of them had witnessed the incident. Mr. Shethna has submitted that Dasharathbhai is paused to be an independent person, but he is interested witness and he was selected to be a complainant during the course of negotiations which might have taken place durinig night hours. Mr. Shethna has also tried to argue that the prosecution evidence is not even certain as to the place of incidsent and as to how scuffle had started with the accused. Mr. Shethna has submitted that complainant Dasharathbhai is not an eye-witness and Bhavnaben, widow of deceased Ramanbhai has turned hostile to the prosecution case. She has not supported the story of the prosecution at all. Evidence of P.W.4 Ranjanben, who is paused to be an eye-witness, should not be accepted as trustworthy and reliable piece of evidence. By referring to P.M. Notes, Mr. Shethna has heavily argued that medical evidence does not support the case of prosecution. Time of P.M. performed and progress of investigation should not have been ignored by the trial Court. Mr. Shethna has also submitted that three different motives are attributed against the accused which are absolutely improbable and evidence led to prove motive is not believable and, therefore, story created to prove the motive by the prosecution raises doubt as to the bonafides of the prosecution. Mr. Shethna has pointed out that accused no.2 is a government servant and at the relevant poinit of time, was residing at Nava Wadaj, Ahmedabad and was serving at Gandhinagar. He has been implicated falsely only with a view to see that he may loose the government service. Evidence of supporting witness Shantilal Laxmanbhai and other witnesses, according to Mr. Shethna, does not inspire any confidence and his evidence does not carry the case of the prosecution any further. It is submitted that joint panchanama about the discovery of muddamal dharia and gupti drawn under the provisions of sec.27 of the Evidence Act at the instance of accused no.1 is inadmissible in evidence and the learned Sessions Judge has erred in considering the inadmissible part of evidence to connect the accused with crime. Mr. Shethna has submitted that father of deceased Ramanbhai was serving in the police department at Jamnagar. A wireless

message was sent to him. Plain reading of evidence of P.W.6 Bachubhai Kodarbhai (exh.19)- father of the deceased, gives an impression that father of the deceased was also not informed well in time about the incident. In nutshell, according to Mr. Shethna, finding of the learned Sessions Judge holding the appellants accused guilty for the offence punishable under sec.302 R/w sec.34 of IPC is unjust, improper, contrary to facts on record and contrary to law and, therefore, the impugned judgment requires to be quashed and set aside and accused appellants should be acquitted.

7. We have heard learned APP Mr. Mankad on all the points which are canvassed by learned Senior Counsel Mr. Shethna. According to Mr. Mankad, PW-4 Ranjanben is a reliable witness and her evidence should not be discarded at all. Her presence at the scene of incident is natural. Even hostile witness Bhavnaben i.e. widow of the deceased, indicates that Ranjanben was present at the scene of incident. Widow Bhavnaben has tried to oblige accused persons. There is no reason to disbelieve version of Ranjanben and if the say of Ranjanben is accepted, then all the appellants can be held guilty. Mr. Mankad has also read injuries sustained by the deceased and the evidence of Dr. Varlekar and has submitted that the say of Ranjanben is supported by the medical evidence. There is no exaggeration in the narration of incident. Presence of complainant Dashrathbhai is shown by this witness Ranjanben and, therefore, the order of conviction and sentence recorded by the learned Sessions Judge should be upheld. Mr. Mankad has also submitted that there is satisfactory evidence to prove the motive alleged by the prosecution. Delay in lodging FIR, according to Mr. Mankad, is explained by the prosecution and in the cases where the court feels that delay has not prejudicially affected the defence side, in that event, FIR should not be viewed with doubt.

8. Before appreciating evidence led by the prosecution, we would like to mention that considering the injuries mentioned in post-mortem notes exh.11 and deposition of Dr. Varlekar in this regard, we are satisfied that the death of deceased Ramanbhai Bachubhai was a homicidal death. Dr. Varlekar had found five injuries on the body of the deceased out of which injury nos. 1 & 2 were incised wounds. Irrespective of the cross-examination as to the nature of these two injuries, we are satisfied that finding of the learned Sessions Judge as to the nature of injuries and cause of death of the deceased is based on proper appreciation. Mr. Shethna, appearing for the appellants-accused, has

therefore not disputed this part of finding recorded by the learned Sessions Judge. We, therefore, do not see any need to discuss in detail medical evidence led by the prosecution during trial. Just to appreciate oral evidence of eye-witness examined by the prosecution, nature of injuries, if referred, may help us in recording ultimate finding. In column no.17 of post-mortem notes exh.11, the following external injuries are shown:-

(1) Incised wound 2" x 1/2" x 2" on left lateral side of neck below mastoid portion. Oval in shape, oblique in direction.

(2) Incised wound 2" x 1/4" x 1/4" on right occipital bone Horizontal in direction.

(3) Contusion 1 1/2" x 1/2" on Right Scapula.

(4) Redness on whole of back of the arm and limb region.

(5) Redness on Bier on Right upper limb posterior side of arm and forearm.

Above narration clearly shows that none of the wound is piercing which has pierced through the neck. It is not the say of the doctor that injury no.1 is entry would of gupti blow or injury no.2 is a exit wound corresponding injury no.1.

9. After careful consideration of the above submissions advanced by learned counsel appearing for both the sides, we have appreciated entire set of evidence led before the trial Court and on appreciation, we find that this is a case wherein we should hold that delay in lodging FIR by the complainant Dasharath has remained unexplained. Delay is not only a mere delay, but is unreasonable delay because close relatives of deceased Ramanbhai Bachubhai are serving in the police department, nearest police out-post is situated at a distance of about 3 kms. Ample opportunities for the prosecution witnesses including Ranjanben were there to rush to the out-post or to the police station situated at a distance of about 9 km. at Vijaynagar to lodge complaint, especially when a young man aged about 22 years was killed on the auspicious day of New Year (Sanvat Kartik-1). Normally, sun sets after 6.30 P.M. in the month of October and so, there was ample time to go either to police out-post or police station and to return back after lodging FIR. There is evidence on

record that Dasharathbhai was able to arrange for a vehicle including jeep car. Dasharathbhai himself is owning jeep car and is holding valid licence to drive jeep car. He had been to Sarpanch of the village during night hours and he was asked to go to police station by the village Sarpanch. Even than, he has not cared to go to the police station at the earliest. Plain reading of his evidence and improvements made by him while deposing before the trial Court, and from the FIR, gives an impression that he had gone to the police station in the company of two to three persons with a view to lodge FIR and as he was selected to be the complainant, after some deliberations for which delay is caused, he filed complaint and he has tried to explain delay at the time of lodging FIR. Delay explained by this witness in FIR does not inspire any confidence in light of the nature of evidence of this witness. We are not inclined to accept submissions of learned APP Mr. Mankad that delay in lodging FIR is reasonably or properly explained. Mere explanation does not become reasonable or convincing. In our view, the explanation given by the complainant as to the delay at the time of lodging FIR is illogical and is not worth accepting.

10. After reading evidence of Dr.Varlekar, post-mortem notes and oral evidence of complainant Dasharathbhai, we feel that the oral version of this witness is not corroborated by the medical evidence. On the contrary, medical evidence contradicts oral version of witness Dashrath. We can give more than one examples in this regard, but in our view, one is sufficient. Witness Dasharath has deposed on oath that he had seen appellant Dharmaji giving a blow of gupti on the neck portion of deceased Ramanbhai Bachubhai as a result of which gupti pierced the neck of the deceased and pointed portion thereof came out of the other side. He has also tried to exaggerate by saying that portion of gupti which came out from neck, was in the length of about 2" to 3". Post-mortem report is contrary to this. Though there is no reference of knife or its use in the FIR, in examination-in-chief, he has tried to improve his version as to the use of muddamal knife. On one hand, he says that if he is inside of his house, he would not be able to see the place of incident. He has accepted that incident had occurred all of a sudden. He has also accepted that he had come out from his house. It is in evidence that the day on which incident took place, was an auspicious day being New Year day and people were visiting houses of each others and were also going to the houses situated in the nearby area. So, this witness might not be in his own house. This witness,

Dasharathbhai, has categorically stated that he was not the only person who witnessed the incident, but many others have witnessed the incident. Inspite of that, the prosecution has not examined any independent witness. This witness has not even named any independent witness in the FIR or in the further statement recorded by the Investigating Officer, otherwise, he would have stated so. Thus, it clearly reveals that this witness is a partisan witness and interested in the result of the case. It appears that after due deliberations and discussions, this witness was planted by the prosecution as the complainant and an eye-witness to the incident.

11. Evidence of Bhavnaben, widow of deceased Ramanbhai Bachubhai does not carry the case of the prosecution any further. Her evidence reveals about the presence of P.W.4 Ranjanben, but she has not stated that Ranjanben had witnessed the entire incident. Witness Ranjanben is close relative, real sister, of the deceased. On the date of deposition, she was about 18 years of age. Hence, on the date of incident, she must be of 16 to 17 years. There is no evidence on record as to her educational back ground. She has stated that she was at her house, but on appreciating evidence of this witness from various angles, we find that the conduct of this witness is unnatural. We agree that merely because a witness is a teen-age or a relative, deposition of such witness should not be viewed with doubt. It is not a rule that there must be some corroboration to the version of such witness, but when the case of delayed FIR is before us, ample corroboration is required by way of rule of prudence. Witness Ranjan does not get sufficient corroboration from the evidence of any other witness. As discussed earlier, it is not safe to seek any corroboration from the oral evidence of the complainant Dasharathbhai as he is un unnatural and a planted witness. Statement of Ranjanben was recorded very late i.e. on the next day and after drawing panchanama of the scene of offence and subsequent to the starting of P.M. Examination. It is in evidence that one relative police officer had visited the house of dseceased in the night on the day of incident. This relative has not been examined by the prosecution. Sarpanch had also visited the house of the deceased and this witness P.W.7 Sureshbhai Rupsing (exh.25)-has stated that he had been to the house of the deceased prior to his visit to the police station. In the next morning when the complainant had gone to the police station for the purpose of lodging FIR, he was with the complainant and at that time, witness Ranjanben had not unfolded the story of the incident before him. Sarpanch can be said to be an

independent person. If P.W. 4 Ranjanben was knowing about the entire incident as an eye-witness, then a young girl aged about 16 or 17 years would certainly tell something about the incident to the Sarpanch who had visited the place. The prosecution has failed to explain as to why family of the deceased kept dead body of a young man in the house in a confused position all throughout night on a New Year day. Looking to the age of the deceased and the day on which incident had occurred, the visitors of nearby houses, even by way of sympathy, would have helped this girl, Ranjanben, if she would have narrated the story of killing of her brother. Considering the conduct of this witness at the time of incident as well as subsequent thereto, we feel that it would not be safe to accept her evidence as a gospel truth. Her conduct, her tied tongue when Sarpanch visited her house and her subsequent conduct, cuts the case of the prosecution to pieces and we are not inclined to accept the submissions of learned APP Mr. Mankad in this regard. Mr. Shethna has rightly argued that joint panchanama drawn under sec.27 of the Evidence Act of recovery of weapons namely dharia and gupti by accused no.1 is not a legal piece of evidence. Even if it is accepted for the sake of arguments that it was a valid recovery by police officer, even than blood stains found on the weapons cannot provide corroboration to Ranjanben and connect the accused with the crime beyond reasonable doubt.

12. Prosecution has examined two witnesses claiming to be the supporting witnesses. One of them is Sarpanch of the village P.W. 7 Sureshbhai Rupsing (exh.25) and another one is P.W.5 Shantilal Laxmanbhai (exh.18). Evidence of Sarpanch Sureshbhai (exh.25) does not support the version of the prosecution or version of any of the witnesses. This witness only states that when he reached the house of deceased Ramanbhai Bachubhai, dead body of Ramanbhai Bachubhai was lying in front of his house and P.W.4 Ranjanben was present and was crying. He has stated that Ranjanben has not said anything to him. Answer given by this witness in para-3 of his deposition goes to the root of credibility of two important witnesses namely complainant Dasharathbhai and P.W.4 Ranjanben. P.W.5 Shantilal Laxman (exh.18) is not an eye-witness. This witness came to know about the death of Ramanbhai Bachubhai on the next day. He only states that on 30.10.1989 i.e. on the date of incident, he had seen accused no.1 & deceased Ramanbhai Bachubhai quarreling with each other; it was hot exchange of words and he had separated them. According to this witness, this quarrel took place at about 2.00 P.M. on that day.

However, after going through the cross-examination of this witness, we find that the same is not sufficient to link accused no.1 with the crime. On the contrary, ignorance expressed by this witness as to the cause of quarrel between accused no.1 and the deceased, makes is version improbable. He has fairly admitted that he had never disclosed this fact that he had separated the deceased and accused no.1 from quarrel, to any body prior to his statement came to be recorded by the Investigating Officer. There is no evidence to show that who informed the Investigating Officer about the fact that this witness Shantilal had seen accused no.1 and deceased Ramanbhai Bachubhai quarreling. Evidence of this witness does not inspire any confidence. So, we are inclined to accept the submissions of learned Senior Counsel Mr. Shethna that there is no supporting evidence to the version put forward by the prosecution witnesses namely complainant Dasharathbhai and P.W.5 Ranjanben.

13. During the course of discussion, we have referred about third motive which is pleaded by the prosecution before the trial Court at the time of leading evidence. Father of deceased Ramanbhai, in his deposition exh.19, has stated that Tara- daughter of his elder brother was subjected to indecent assault (molestation) by the elder brother of appellant no.4 Ashok Dhulabhai Parmar and complaint was made to the Caste Head and it was decided that there should not be any social relations or dealings with the family of Babubhai Dhulabhai. This part of evidence is totally foreign to the prosecution case. On the contrary, this evidence will help accused Ashok Dhula that he might be implicated falsely to settle the accounts. We agree that motive is not to be pleaded or proved by the prosecution if prosecution is otherwise able to establish the guilt of the accused beyond reasonable doubt. But when motive is pleaded specifically and when prosecution has tried to lead evidence to prove the same, then evidence led should be at least of satisfactory nature. Failure to lead such satisfactory evidence may weaken the case of the prosecution. In the case before us, first motive pleaded by the prosecution is quarrel between young girls playing fables and surprisingly, witness Shantilal neither refers the presence of such girls in his deposition nor the prosecution has cared to examine any of the girls before whom quarrel must have started. In nutshell, we are not in agreement with the finding recorded by the learned Sessions Judge, in this regard.

14. FSL Report about the blood stained cloths and blood stained weapons does not carry case of the

prosecution any further because evidence as to recovery of weapons at the instance of the accused is neither convincing nor legal. Merely because clothes of P.W.4 Ranjanben and/or Bhavn[aben, widow of the deceased were found blood stained, their presence at the scene of offence cannot be inferred as the deceased was taken to his house after assault. It is quite natural that the clothes of the person participating in the said exercise of removing the deceased to his house, would be stained with blood. We agree that one bushirt and bunniyan allegedly recovered from the person of Raman Nanji was found with human blood having "B" group. But at this stage, four aspects cannot be ignored viz. (i) Bachubhai Kodarbhai; father of the deceased; himself had said in his deposition that basically they are one family; (ii)undisputedly accused Raman Nanji had sustained one injury, (iii) blood of Raman Nanji was not taken or sent to the Laboratory for test. Blood from the body of deceased Raman Bachubhai only was taken and sent to the Laboratory; (iv) there is no reliable evidence on the point of recovery of bushirt and bunniyan from the body of accused Raman Nanji. So, even if FSL report is accepted as a reliable piece of evidence, it does not help prosecution much. In nutshell, we are of the view that the learned Sessions Judge has committed apparent error in appreciating entire set of evidence available on record.

15. Injury on the body of accused no.1 reflected in medical certificate exh.12 given by Dr. Varlekar is a circumstance against accused no.1. Learned Sessions Judge while branding accused no.1 as "Sutradhar" of the incident, mainly has relied on the nature of the injuries found on the body of accused no.1 when he was taken to Dr. Varlekar. However, the initial story of the prosecution is that accused no.1 was pelting stones towards the deceased and one stone had touched the arm of the deceased, but on four major counts, we do not consider this evidence against accused no.1 as sufficient; namely (i) there is no reference as to the age of injuries found on the body of accused no.1 i.e. before how much time the alleged injury could have been sustained by accused no.1 prior to his examination by Dr. Varlekar, (ii) injury on the body of the accused is not explained by any of the prosecution witnesses, though the same was on the upper part of the body near the neck, meaning thereby that said injury was visible; (iii) learned Sessions Judge, while recording statement under sec.313 of Cr.PC, has asked the compound question when this incriminating circumstance was brought to the notice of the accused. Question framed by the learned Sessions

Judge was " what he has to say about the injuries reflected in the certificate exh.12 and what he wants to say about the taking out of piece of lever from the body of the deceased ? " In one question, answers of two questions were asked and accused had said " it is not true". According to us, when a clinching circumstance is available on record, then, same should be brought to the notice of the accused and he should be offered an opportunity to explain the same. It is difficult for us to hold that answer given by the accused should be treated as improper or false explanation qua the question asked as to the injury of his body; (iv) the case of the prosecution itself is that there was a scuffle prior to the incident and thereafter the incident had occurred all of a sudden and there was pelting of stones. So, one simple injury on the neck of accused in such circumstances, cannot be said to be inconsistent with his innocence. Role of accused no.1 put forward by the prosecution, when is not satisfactorily established by the prosecution, we are not inclined to connect the accused with the crime merely because he had one simple injury on his body.

16. Under sec.313 of CrPC, the accused shall have to be asked the questions to enable him personally to furnish explanation against the incriminating evidence recorded by the Court or the circumstances appearing in the evidence against him. Such evidence or circumstances appearing against the accused requires to be pointed out to the accused clearly and specifically. There should be no complexity in forming question. The Court should be conscious about the fact that there is no clubbing of two separate incriminating evidence or clubbing of one incriminating circumstance or evidence with another less irrelevant incriminating circumstance or evidence. Such contingency is likely to prejudice the accused seriously because as per the settled legal position, false explanation or non-explanation by the accused about incriminating evidence is a circumstance which may weigh against him. Non-giving of an opportunity to explain incriminating circumstance can be equated with such contingency where a compound or complicated question is put to the accused while examining the accused under sec.313 Cr.PC. Considering the nature of questions asked to accused no.1 about the injury found on his body, according to us, is of compound nature and we are of the view that the answer given, in response to the question put to the accused, therefore, should not be treated as a false answer or explanation. Accused may, under such contingency, commit an error. Examination of the accused under Sec.313 of CrPC is not an empty formality and it is

the duty of the Court to question the accused properly and fairly bringing home the exact case in simple and clear language which the accused has to meet and each material point that is sought to be used against him so that accused can be given a chance to explain if he so desires. Every circumstance against accused must be separately and distinctly put to the accused so as to enable to explain the sdaid circumstance. From the discussion as aforesaid, it clearly transpires that the examination of the accused under sec.313 of CrPC is not properly done. Under the circumstances, even if, for the sake of arguments, we say that accused no.1 has failed in explaining injury sustained by him, even then this error cannot be equated with clinching evidence against the accused. We can quote catena of decisions on this aspect, but according to us, reference of judgments rendered in the case of Surendraprasad Jayashankar v/s State of Gujarat, reported in 1979(2) GLR P.459 and in the case of Zala Krishna Vijaysinh v/s State of Gujarat, reported in 1993(1) GLR P.288, would serve the purpose. We are holding this in light of special circumstance that the prosecution has not cared to explain story and that accused was taken to the doctor on 3.11.89 i.e. after 24 hours. So, the same also does not inspire any confidence. We do not want to suggest that he might have been beaten by police personnels. We have, therefore, simply observed that in absence of evidence as to the age of injury in the certificate as well as in the oral version of Dr. Varlekar, it is not possible to hold against the accused.

17. In nutshell, in the totality of the set of facts, we find that findings recorded by the learned Sessions Judge are based on improper and erroneous appreciation of oral as well as documentary evidence. None of the accused was charged individually for the offence punishable under sec.302 of IPC. There is no circumstance or any iota of evidence to attribute common intention to the accused persons to kill the deceased. Age of the accused persons involved in the crime is also relevant. As the prosecution has tried to put a totally new case before the Court from the initial version, it would not be safe for us to hold that the findings recorded by the learned Sessions Judge are proper or legal. So, we are inclined to allow this appeal in toto.

18. For the reasons aforesaid, this appeal is allowed. The impugned judgment dated 5.11.1990 passed by the learned Addl. Sessions Judge, Sabarkantha at Himmatnagar in Sessions Case No. 14/90 convicting the

appellants accused nos. 1 to 4 for the offence punishable under sec.302 R/w Sec.34 of I.P.Code and sentencing each of the appellants-accused to suffer R/I for life, is hereby quashed and set aside and appellants accused nos. 1 to 4 are hereby acquitted of the offences for which they are convicted and sentenced. We are told that appellant-accused no.2 is in jail while rest of the appellants accused are on bail. Hence, appellant-accused no.2 Bhurabhai @ Bhupendrabhai Dhamaji Modia is ordered to be set at liberty forthwith if detained in any other case. Bail-bonds of the appellants-accused who are on bail stand cancelled. Sureties discharged.

04.07.2000 [K.R. VYAS, J]

[C.K. BUCH, J]

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